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THE UNITED STATES AND THE EXPANSION OF THE LAW BETWEEN NATIONS

THOMAS WILLING BALCH

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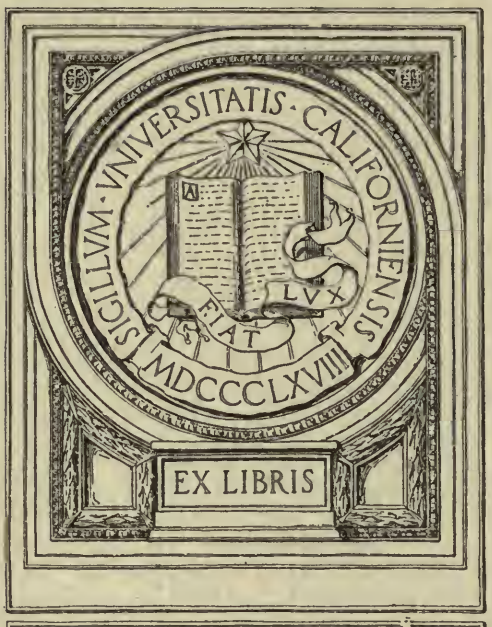

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THOMAS WILLING BALCH

Member of the Philadelphia Bar
The American Philosophical Society, etc.

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THE UNITED STATES AND THE EXPANSION OF THE LAW BETWEEN NATIONS.[1]

Since the Great War began, in which, counting the Grand Duchy of Luxembourg and the Republic of San Marino, fifteen states are engaged at the time this article is written, and which embraces in its area much more than half the land of the earth, the rules and customs of the Law of Nations have been buffeted about very much both upon the land and the sea. In this state of tumult upon both land and sea, the United States of America, as the chief of the neutral nations, have again, as on several previous occasions in the past, striven not only to perform with impartiality their *duties* as a neutral state, but also to uphold their *rights* according to the Law of Neutrality. For it must not be lost sight of, as many people do, that under the Law of Neutrality neutrals have rights which they can maintain, as well as duties which they must perform. The stand taken by America in behalf of neutral rights during the present war, under the leadership of President Wilson and Secretary Lansing, will undoubtedly affect in some measure, impossible now of prediction, the future development of public international law. It would seem appropriate then, to point out briefly the influence which the United States, since they declared their independence one hundred and thirty-nine years ago, have exerted in shaping and moulding, in some important particulars, the development of the Law between Nations.

In colonial days a few copies of Grotius in Latin and likewise some copies of Puffendorf, most of them probably in Latin too, found their way to the British North American colonies. Thus the Library Company of Philadelphia, founded in 1731 by Franklin, ordered in March, 1732, an English translation of

[1] It is to the Chancellor d'Aguesseau that is due the name, *Droit entre les gens.*

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Puffendorf's work, *"Law of Nature, etc."*[2] That library also some years later obtained an English translation of the book of the Swiss publicist, J. J..Burlemarqui, *The Principles of Natural Law,* published at London in 1758.[3]

When the struggle between the colonies and the mother land had become an actuality, the need for "the latest word" as to what was the Law between Nations, undoubtedly was felt by the men who directed the policy of the united colonies. And so to Charles Guillaume Frédéric Dumas, belongs in large measure the honor, apparently, of sending over from Europe, where modern international law was born in the early part of the seventeenth century, across the Atlantic Ocean to the newly forming thirteen American nations, the law binding between nations. For Dumas sent from The Hague to Franklin at Philadelphia, two copies [4] of the new edition of the celebrated treatise of the Swiss, Emer de Vattel, of Neuchatel, *Le Droit des Gens ou Principes de la Loi Naturelle.*[5] This new edition was published at The Hague in 1775 and edited by Dumas. Vattel's work was known at that time not only to every one in Europe who professed any knowledge of the Law of Nations, but also was looked upon in the foreign offices of the European powers as the leading treatise upon the subject. And even today Vattel's treatise is continually cited by publicists in their writings, and by lawyers before the courts in disputes turning upon the proper application of the Law of Nations.

One of the two copies of Vattel which Dumas sent to Franklin, the sage of Philadelphia presented in Dumas's

[2] Albert J. Edmunds: The First Books Imported by America's First Great Library, 1732, Pennsylvania Magazine of History and Biography, Philadelphia, 1906, p. 301.

[3] Concerning the colonization of the thirteen colonies and the influence of European publicists on American thought, see Thomas Balch: Les Français en Amérique Pendant la Guerre de l'Indépendance des Etats-Unis, 1777-1783, Paris, 1872; Sydney George Fisher: The Struggle for American Independence, Philadelphia, 1908; and Paul Fredéricq of Ghent, an open letter in the Journal de Genève, July 10, 1909.

[4] Albert Henry Smyth: Benjamin Franklin, New York, 1906, Vol. VI, p. 432.

[5] Vattel's work was first published in 1758.

name to the Library Company of Philadelphia which Franklin had been instrumental in establishing in 1731. Among the records of the directors of the library, there is this interesting minute:—"Oct. 10, 1775. Monsieur Dumas having presented the Library with a very late edition of Vattel's *Law of Nature and Nations* (in French), the Board direct the secretary to return that Gentleman their thanks."

Franklin tells us that this copy was much used by the members of the First Continental Congress. This same copy undoubtedly was used by some of the members of the Second Continental Congress, which sat at Philadelphia; by the leading men who subsequently directed the policy of the united colonies until the end of the war; and later by the men who sat in the Constitutional Convention of 1787-89 and framed the Constitution of the United States. For in those days the library was housed in Carpenter's Hall where the First Continental Congress deliberated and within a stone's throw almost of where the Second Continental Congress met in the Colonial State House of Pennsylvania, and likewise near where the men who framed the Constitution held their discussions and where the Supreme Court of the United States first held court.[6] That copy of Vattel surely was well known to the early fathers of the Republic, some of whom read French with ease. And as it is expressly stated in the Constitution that the Law of Nations forms part of the law of the land, thereby making international law part of the law which American courts must take cognizance of and interpret when they give decisions, it is easily seen that Vattel had a very appreciable influence in shaping the attitude of the United States of America towards the Law of Nations from their very beginning as a confederation of thirteen newly constituted members of the family of nations until they agreed by the adoption of the present Constitution to merge themselves into the single and much greater single member of the family of nations, the present United States of America.

[6] George Maurice Abbott: A Short History of the Library Company of Philadelphia, Philadelphia, 1913, p. 11.

Another copy of Vattel's work which Dumas sent to Franklin is in the library of Harvard University. Franklin sent it in the summer of 1776 to James Bowdoin, afterwards Governor of Massachusetts and a member of the Constitutional Convention of 1787-89. Bowdoin presented it to Harvard College in Franklin's name. But it should have been recorded as the gift of Dumas, for it was at Dumas's wish that Franklin sent it to Harvard College. In this Harvard copy there is written in a French hand, apparently before it was pesented to Harvard University, the following commentary which is of remarkable interest for the then young North American Confederation. Probably it was written by Dumas with his own hand. But whether it was original with him or was taken from the writings of one of the sages who have in different climes and various epochs commentated upon the manner and form of government of mankind, it is not as yet possible to determine.

This French commentary begins with the caption, "A note of the Editor" *(sic)*, apparently in the same handwriting as the note itself, which is as follows:

"Il est des peuples généreux et magananimes, que leurs vertu rendra avec le temps des Etats absolument indépendants & autonomes. 'Mes chers Amis (leur dira alors quelque Sage) Vous ne sauriez mieux faire que d'adopter chez vous la Constitution Angloise, moyennant un petit changement qui, selon moi, pourra rendre plus parfaite cette forme de Gouvernement mixte, si heureusement tempérée. Ce changement est de n'avoir ni royauté, ni noblesse, ni Sénat héréditaires. L'on peut tout aussi peu hériter de l'art de gouverner les hommes, que de celui de les guérir, ou de leur apprendre à penser, à chanter, à danser. Gardez vous cependant de rendre votre Gouvernement électif; ce seroit encore pire: ce ne seroient presque jamais les meilleurs ni les plus sages, mais les plus forts & les plus méchants qui vous conduiroient.—Qui nous désignera donc les Peres de la Patrie?—Eh! mes Amis, c'est la Nature, qui de tout temps les a montrés du doigt aux premieres Sociétés; & les Sociétés suivantes ont toujours été aveugles, & sourdes à la voix de la nature. Les plus âgés d'entre vos Peres de familles fonciers, voila les seuls Rois, s'il en faut, les seuls Sénateurs, les seuls Seigneurs (Seniores) dignes de Vous. Vous les tirerez de la charrue; ils y laisseront leurs fils; & l'âge avancé seul conciliera à ces derniers le respect & la vénération de vos petits-fils & de vos arriere-petits-fils, avec le droit s'ils se trouvent les ainés de toute la nation, de la conduire à leur tour.'"*

A foot-note to the original manuscript text is as follows: "**J'appelle fonciers les prossesseurs des terres.*"

The above sage counsel as to the best manner of forming the new government that was necessary to hold the colonies together, when read in the light of the history of the subsequent one hundred and thirty-nine years which have elapsed since the volume was presented to Harvard University, is certainly a prophetic comment on the development of our political institutions. Thus in it, Lincoln, Grant and Cleveland loom up. And also a suggestion of the decadence of the personnel of parliamentary government the world over as a result of manhood suffrage is made in it. Whether Dumas wrote the passage or quoted it from some other publicist, the author of it, whoever he was, was evidently a scholar well versed in the past experiences of the human race in its efforts to solve the complex problem of the art of government. Doubtless that commentary was read not only by Franklin and Bowdoin, but also by some of the other statesmen who helped to mould the institutions of the United States.

As the Law of Nations was thus literally sent across the Atlantic Ocean to the new budding thirteen nations by a Hollander residing at The Hague, in the treatise of a famous Swiss publicist, a treatise which was recognized at that time all over Europe as the leading authorative work upon the Law of Nations, as the Swiss Confederation up to that time had done more by its foreign policy to develop the actual practice of neutrality than any other power, and as Vattel had stated the conception of neutrality, probably more clearly than any publicist up to the time that he wrote, it was eminently fitting and logical that the young nation which resulted from the blending of the thirteen colonies upon the adoption and ratification of the Constitution of 1787-89, separated from Europe and its quarrels by the broad Atlantic, should do much to develop and make more precise the Law of Neutrality. Indeed it is not risking much to say that the policy of neutrality practiced by the United States and demanded by them of other nations has been the most potent single factor to shape the Law of Neutrality as we have it today.

During the middle ages it was considered perfectly proper for one feudal potentate to allow another feudal prince to march his troops across the territory of the former lord in order to attack a third prince and his possessions, without the sovereign whose lands were used as a highway for the purposes of the attack being considered involved in the struggle in any way. The belligerents were merely making use of the public highways. As the feudal holdings were slowly consolidated into the European powers, more or less roughly in several instances upon the basis of nationality, questions gradually grew out of the political policy of the newly forming states, while at the same time the questions that related to the conduct of individual lords or nobles became of less and less importance. As the former and newer class of questions gained in prominence with the gradual change from the feudal system to the newer idea of centralized monarchies as the basis of the political divisions of Europe, the questions relating to the conduct of individuals became more and more insignificant and dropped gradually into the background. But the idea of one potentate preserving what is meant today by neutrality when others were engaged in war, was practically not understood until Vattel's time; and even he did not state it with all the fullness that the word neutrality means today as a term of international law.

Grotius in his immortal work, *De Jure Belli ac Pacis*, published in 1625, said, according to Westlake's rendering, that

"the duty of those who keep aloof from a war is to do nothing by which the one whose cause is bad may be strengthened, or the movements of him who is engaged in a just war may be impeded, but in a doubtful case to treat the two parties equally in allowing passage, in furnishing supplies to their armies, and in abstaining from the relief of besieged forces." [7]

Thus in the absence of a benevolent neutrality which the father of the Law of Nations urged at the end of the first quarter of the seventeenth century, he taught equality of treatment for both belligerents. And Bynkershoek in his *Quaestiones Juris*

[7] Liber 3, c. 17, § 3.

Publici, published in 1737, upheld Grotius in maintaining equality of treatment of the belligerents as the test of judging neutral duties.[8] Vattel, however, in the latter half of the eighteenth century, maintained that the real test of neutrality was for a neutral state to abstain from taking part in the war, except in so far as it was bound by a former treaty to aid one of the belligerents.[9]

Thus the publicists progressed slowly on the road to the present day well developed idea of neutrality. A decided impulse toward the acceptance of some of the rules that now govern the relations of neutrals and belligerents on the sea was begun under the leadership of the great Catharine and her advisors, by an association of a number of the European nations in 1780, a league since known to history as the First Armed Neutrality.

The most important impulse, however, to the expansion of the Law of Neutrality was to come from the young Republic of the west, in the last decade of the eighteenth and in the first quarter of the nineteenth century.

The policy of neutrality set up and enforced by the United States with Washington as President and Jefferson as Secretary of State, during the war waged between France on the one side and Great Britain and several other states on the other side, shortly after the founding of the first republic in France, defined much more clearly than had been the case in the past, what might and might not be done on neutral territory in behalf of belligerents.

The French Republic declared war against Great Britain, Holland and Spain, February 1st, 1793. With the aim of guarding the American Republic against needless embroilment in the struggle, President Washington on April 22nd, issued his now justly famous proclamation declaring the neutrality of the United States of America and warning American citizens not

[8] Liber 1, c. 9. See also Du Ponceau's translation of the first book of this work, published at Philadelphia in 1810 under the title, "A Treatise of the Law of War," Chapter 9.

[9] Liber 3, § 104.

to give aid to either side in contravention of that proclamation and the Law of Nations.[10] And that proclamation was illuminated by Jefferson in various state papers which he addressed either to the ministers in America of the belligerent governments, or else sent through the intermediary of the American representatives abroad to the belligerent governments.

In corresponding with the French minister to America, Monsieur Genêt, Jefferson had occasion to expound some points of the Law of Neutrality which arose in the relations between the two republics. For, upon landing April 8th, 1793, at Charleston, South Carolina, two weeks before Washington issued his neutrality proclamation, the new envoy sent by the French Government to the American Government at Philadelphia, Monsieur Genêt, acting on the theory of neutrality that had prevailed in the past when it was perfectly proper for a belligerent to march troops across the territory of a neutral state, to make war upon another belligerent, at once began to arm and commission several vessels and then send them out to sea to prey upon the maritime commerce of Great Britain, a state with whom America was at peace. Minister Genêt also instructed the French consuls in America to act as courts of admiralty to pass upon the legality of prizes brought by French cruisers into American ports. Washington called his Cabinet together, and it decided that the commissions granted to privateers by Genêt, as also the condemnation of prizes by the consuls of France, were void. At another meeting of the Cabinet it ordered that all privateers commissioned by Genêt must leave American ports, and took effective measures whereby other vessels that were being fitted out as French privateers were prevented from going out to sea.

In answer to M. Genêt's argument that it was a usual duty of the consuls of France to grant commissions and letters of marque to privateers, Secretary Jefferson wrote on June 5th, 1793, to the envoy of France:

[10] American State Papers, Foreign Relations, Washington, 1833, Vol. 1, p. 140.

"It is the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring powers; that the granting military commissions, within the United States, by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country; that the departure of vessels, thus illegally equipped, from the ports of the United States, will be but an acknowledgment of respect, analogous to the breach of it, while it is necessary on their part, as an evidence of their faithful neutrality."

Later, on August 16th, 1793, Jefferson wrote to the American Minister at Paris, Gouverneur Morris, further in support of the right and duty of the United States to maintain its neutrality:

"The right of raising troops, being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory, without its consent. . . . That if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistment."

It was soon found, however, by practical experience that the United States of America could not, under the common law as it then existed in America, effectively prevent their citizens from taking an active part in the war and thereby endangering the neutrality of the country. Gideon Henfield, an American citizen, who had taken service on a French privateer, came sailing up the Delaware in 1793 to Philadelphia, in charge as prize master of a British vessel which had been captured by the privateer. For thus disregarding the neutrality proclamation of the President, he was indicted at common law, in the federal court. Although Justice Wilson in his charge to the jury, urged upon them that the defendant should do nothing that might harm his country, that under the Constitution the treaties of the United States with foreign powers were part of the law of the land, and that the United States had entered into a treaty

of friendship with Great Britain which was then in force, the jury, nevertheless, acquitted Henfield.[11]

This verdict made it clear that the municipal law then in force in the country might not be sufficient to prevent American citizens from engaging in their own country in the service of a belligerent. President Washington and Secretary Jefferson persuaded Congress to pass the Neutrality Act of 1794. That act temporarily forbade citizens of the United States from accepting letters of marque from a belligerent state, or to enlist in America in the military forces of a foreign nation, and prohibited vessels which were intended to cruise as privateers for a foreign belligerent from fitting out and arming in American ports. Several other acts relating to the same object of preserving the neutrality of the country were enacted from time to time, until finally on April 20th, 1818, under the influence of the wars for independence of the South American countries then in progress, Congress dealt with the subject on a comprehensive scale in the Foreign Enlistment Act which it enacted and which is still in force. That enactment led in the following year to the passage by the British Parliament of the British Foreign Enlistment Act. And when as a result of the events of the American Civil War, it became clear that the Act of 1819 was not sufficiently stringent to enforce British neutrality, it was superseded by another act in 1870 which is still in force. As Westlake justly remarks, "no state law of the kind is a declaration to the world of what the state in question deems to be its international duty as a neutral. It is a declaration to its own subjects of the powers which it deems necessary to take over them, whether in pursuance of its own policy or in order to ensure the performance of its neutral duty." Still the enactment of such municipal statutory law, is an indication of what the conduct of neutral nations towards belligerents should be. The precautionary measures that many governments have since

[11] Henry Wheaton: Elements of International Law, edited, with notes, by Richard Henry Dana, Jr., Boston, 1866, p. 543, note.

taken by the enactment of municipal statutes to enable them to safeguard and maintain their neutrality in case of need, have resulted from the early lead that the United States of America took in such matters.

The policy of neutrality as stated by Jefferson in his communications above quoted to Genêt and Morris, and enforced by the United States in the war then raging between France and Great Britain, made much more clear than ever before that time what can and cannot properly be done in neutral territory in intercourse with belligerents. That policy has had a great influence on the expansion of the Law of Neutrality, and even helped to gain the American legal victory before the Geneva Tribunal in 1872.

If, however, under President Washington and Secretary Jefferson, the American Republic took advanced ground to perform its neutral duties, it was not less backward, if perhaps not so successful, in upholding the neutral rights of its citizens to trade with countries with which, though they happened to be belligerents, the United States were at peace and on terms of friendship.

One of the most important of the state papers of Jefferson, upholding the right of American citizens to trade with belligerents, was his letter of May 15th, 1793, to the British envoy at Philadelphia, Mr. Hammond, in which the American statesman defined the rights of American citizens to sell arms to any or all belligerents. Jefferson said:

"Our citizens have been always free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The Law of Nations, therefore, respecting the rights of those at peace, does not require from them such an internal disarrangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any belligerent powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned, and, that even private contraventions

may work no inequality between the parties at war, the benefit of them will be left equally free and open to all."

That definition of the right of private citizens of a neutral power to sell arms to any belligerent government, subject to the risk of capture of the arms during their transit on the high seas, by the cruisers of one of the belligerents, helped to form international law on that point: and that statement is an absolutely sound exposition of the law of nations on that point today.

Other points of difference between the United States and Great Britain, requiring a prooper interpretation of the rights of neutrals, soon arose.

On June 8th, 1793, the British Government, by an Order in Council, gave instructions to the commanders of British ships of war and privateers having letters of marque against France, to seize all neutral vessels laden with "corn, flour, or meal, bound for any port in France, or any port occupied by the armies of France," and all neutral vessels, except those of Denmark and Sweden, attempting to enter any blockaded port.[12] Since the United States, Denmark, and Sweden were the leading neutral powers, it was evident that this last measure was aimed against American vessels. Though dated June 8th, this Order in Council was not issued until the 28th day of the month.[13] The British Minister at Philadelphia, Mr. Hammond, in communicating this Order in Council to Secretary Jefferson, said:

"By the law of nations, as laid down by the most modern writers, it is expressly stated, that all provisions are to be considered as contraband, and as such, liable to confiscation, in the case where the depriving an enemy of these supplies, is one of the means intended to be employed for reducing him to reasonable terms of peace. The actual situation of France is notoriously such, as to lead to the employing this mode of distressing her by the joint operations of the different powers engaged in the war. . . . The present measure pursued by His Majesty's Government, so far from going to the extent which the Law of Nations, and the circumstances of the case would have warranted, only has prevented the French from being

[12] American State Papers, Foreign Relations, Washington, 1833, Vol. 1, p. 240.

[13] *Ibid.*, p. 241.

supplied with *corn* omitting all mention of *other* provisions; and even with respect to corn, the regulation adopted is one which, instead of confiscating the cargoes, secures to the proprietors, supposing them neutral, a full indemnification for any loss they may possibly sustain."

The American position on this question was stated at length by Secretary Jefferson in a communication to the American Minister at the Court of Saint James, Mr. Pickney.[14] After speaking of having received unofficial information of the Order in Council of June 8th, and stating in substance the first article of that Order, he went on to say:

"This article is so manifestly contrary to the Law of Nations, that nothing more would seem necessary, than to observe that it is so. Reason and usage have established, that when two nations go to war, those who choose to live in peace retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual; to go and come freely, without injury or molestation; and, in short, that the war among others shall be, for them, as if it did not exist. One restriction on those mutual rights has been submitted to by nations at peace, that is to say, that of not furnishing to either party implements merely of war, for the annoyance of the other, nor any thing whatever to a place blockaded by its enemy. What these implements of war are, has been so often agreed, and is so well understood, as to leave little question about them at this day. There does not exist, perhaps, a nation in our common hemisphere which has not made a particular enumeration of them, in some or all of their treaties, under the name of contraband. It suffices, for the present occasion, to say that corn, flour, and meal are not of the class of contraband, and consequently remain articles of free commerce. A culture which, like that of the soil, gives employment to such a proportion of mankind, could never be suspended by the whole earth, or interrupted for them, whenever any two nations should think proper to go to war."

Jefferson went on to maintain that neither of the belligerents had the right to interrupt the legitimate trade of American citizens with all the world. He made a powerful argument that the United States had the right to trade in her food stuffs with whom she wished, and asserted that if Great Britain felt

[14] *Ibid.*, p. 239.

the need of reducing an enemy nation by starvation, she had no right of doing it at the loss of the United States.

September 3, 1793, the British Admiralty issued an order "that freight and reasonable expenses" should be allowed "to all masters of neutral ships. . . . Provided always, that no *mala fides*" should appear. The order went on to say, "Demurrage shall be allowed, and considered as a reasonable expense, only in cases where the ship shall be pronounced to have been unjustly seized and brought in for adjudication," or when the captured vessel was unfairly held.[15]

On the 6th of November, 1793, the British Government applied the rule of the War of 1756[16] to the trade between France and her colonies by an Order in Council that was published December 23d, following. It instructed the commanders of British war vessels or privateers to capture and seize "all ships laden with the produce of any colony belonging to France," or that carried provisions or supplies to any French colony.[17]

This order, of course, was equivalent to stopping all trade by neutral nations with the colonies of France, and neutrals in this case meant practically the United States.[18] It aroused much feeling among the American people towards Great Britain.[19]

Meanwhile, Edmund Randolph, who had succeeded Jefferson as Secretary of State, had addressed on May 1st, to the British Minister at Philadelphia, Mr. Hammond, a long and learned despatch protesting against the interference of Great

[15] *Ibid.*, p. 315.

[16] Henry Wheaton (edited by Richard Henry Dana): Elements of International Law, Boston, 1866, p. 666; Theodore Dwight Woolsey: Introduction to the Study of International Law, New York, 1883, Fifth Edition, p. 349. John Westlake: International Law, Part II, War, Cambridge University Press, 1907, pp. 254-255; James Madison, Examination of the British Doctrine Which Subjects to Capture a Neutral Trade Not Open in Time of Peace, 1806, see Letters and other Writings, Philadelphia, 1865, p. 229.

[17] American State Papers, Foreign Relations, Washington, 1833, p. 430.

[18] James Madison: A Memoir Containing an Examination of the British Doctrine Which Subjects to Capture a Neutral Trade Not Open in Time of Peace, in "Letters and Other Writings," Philadelphia, 1865, Vol. II, p. 310.

[19] Richard Hildreth: History of the United States of America, New York, 1882, Vol. IV, pp. 481, 482.

Britain with the rights of the United States to carry on commerce with France except in contraband of war;[20] and contraband of war in those days meant an infinitely more restricted list of articles than it has been expanded into meaning today.

Many American vessels were taken and their cargoes condemned. This caused a hardship on the commerce of the United States. Finally, however, the situation was eased off in a measure by the British Government by an Order in Council of January 8th, 1794, that revoked that of the previous 6th of November.[21]

This new Order changed, to quote James Madison,[22] "the preceding instructions in three respects. First: in substituting 'the French West India Islands' for 'any colony of France,' of which there are some not *islands,* and others not West India Islands; Second: in limiting the seizure, to produce 'coming directly from any port of the said islands'; Third: in the very important limitation of the seizure, to vessels bound from those islands to any port *in Europe.*"

These new regulations weighed less than the original Order on the foreign commerce of the United States, especially in curtailing captures to vessels bound directly from the French West India Islands to European Ports. The new Order, therefore, allowed importation into the United States of French West India production, which could then be retransported to Europe.[23] And in spite of the need of paying customs duties to America, a round about trade sprang up from the French West Indies to Europe by way of the United States, which lasted for more than ten years.

However the Americo-British relations continued strained. In a message to the United States Senate, of April 16th, 1794, President Washington spoke of the "serious aspect of our affairs with Great Britain," and then said:

"But as peace ought to be pursued with unremitted zeal, before

[20] American State Papers, Foreign Relations, Washington, 1833, p. 450.
[21] *Ibid.*, p. 431.
[22] See *supra,* note 18, at p. 313.
[23] See *supra,* note 18, at p. 313.

the last resource, which has so often been the scourge of nations, and cannot fail to check the advanced prosperity of the United States, is contemplated, I have thought proper to nominate, and do hereby nominate, John Jay as envoy extraordinary of the United States to His Britannic Majesty." [24]

Mr. Jay's appointment was confirmed by the Senate.

Edmund Randolph, who had succeeded Thomas Jefferson as Secretary of State, in his instructions to Jay of May 6th, 1794,[25] referred to "the vexations and spoliations committed on our commerce by the authority of instructions from the British Government." Randolph further continued:

"You will perceive that one of the principles, upon which compensation is demanded for the injuries under the instructions of the 8th of June, 1793, is, that provisions, except in the instance of a siege, blockade, or investment, are not to be ranked among contraband. . . . The matter of these instructions (November 6th, 1793) fills up the measure of depredations. They were unknown publicly in England until the 26th of December, 1793; there is good reason to suppose that they were communicated to the ships of war before they were published, and that in consequence of a private notification of them, a considerable number of new privateers were fitted out. The term 'legal adjudication,' in spite of the explanation on the 8th of January, 1794, was most probably intended to be construed away or not, according to events, and many vessels have been condemned under them. Compensation for all the injuries sustained, and captures will be strenuously pressed by you."

Chief Justice Jay, as special American envoy, and Lord Grenville, British Foreign Secretary, concluded on November 19th, 1794, a general convention adjusting the relations between the two countries. That convention upon its ratification by the United States Senate on June 24th, 1795, became a treaty. The seventh article of that treaty provided for the settlement of the claims of American citizens against the British Empire for unjust seizure of their vessels and goods on the high seas by British cruisers and privateers, during the war in progress between Great Britain and France, by a reference of such claims to a board of five commissioners. The commissioners closed

[24] American State Papers, Foreign Relations, Washington, 1833, p. 447. Henry Flanders: Lives and Times of the Chief Justices of the Supreme Court of the United States, Philadelphia, 1881, Vol. I, pp. 403-404.

[25] American State Papers, Foreign Relations, Washington, 1833, p. 472.

their examination of claims, February 24th, 1804.[26] Of the many cases which they passed on, some they dismissed, and in others they awarded damages.[27] The total amount which they awarded to American citizens was close to $11,650,000.00.

The policy of the United States in carrying on war on land has also profoundly moulded and shaped the rules governing the manner of conducting war on land. In the midst of the American Civil War, upon the advice of General Halleck, President Lincoln commissioned Francis Lieber of Columbia College to draw up a code of rules for the instruction of the armies of the United States in the field as to the manner of carrying on war. Revised by American officers, these rules were published by the American Government, April 14th, 1863, under the title, *Instructions for the Government of the Armies of the United States in the Field, drafted by Francis Lieber.* While recognizing that the object of a belligerent engaged in war on land is to win through the destruction or capture of the army of the enemy and the resources upon which that army relies, yet by that code of rules the federal authorities sought to avoid needless destruction of life and property. This will be seen by quoting a few of the rules, to wit:

"68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war and, indeed modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful.

"69. Outposts, sentinels or pickets are not to be fired upon except to drive them in, or when a positive order, special or general, has been issued to that effect.

"70. The use of poison in any manner, be it to poison wells or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

"71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States, or is an enemy captured after having committed his misdeed."

[26] John Bassett Moore: Arbitrations to Which the United States Has Been a Party, Washington, 1898, Vol. I, p. 341.

[27] *Ibid.*, pp. 343-344.

This code of Lieber not only was used by the Union armies during the rest of the Civil War, but afterwards influenced the framing of the code prepared, though never ratified by the powers, at the Brussels conference of 1874. The war code of Lieber, who was a great friend of Bluntschli of Heidelberg, had an immense influence upon the preparation by the Heidelberg scholar of part of his proposed code of the Law of Nations.[28] And Lieber's war rules and regulations formed the basis of the rules of the law of war as determined at the First and the Second Hague Peace Conferences in 1899 and 1907 respectively.

On the sea as well, the United States have led the way for the codification of the rules of war. On June 27th, 1900, the United States published to the world a body of rules for the use of their navy, the so-called *United States Naval War Code.* These rules were drafted by Captain (now Rear-Admiral) Charles Herbert Stockton of the United States Navy. Though this code of rules was withdrawn by the American Government February 4th, 1904, because until their adoption by the leading maritime powers of the world, they would have placed the United States Navy at a disadvantage in case the American Republic became engaged in war with a strong maritime power which did not recognize the rules as binding upon its own naval forces, nevertheless the work of Admiral Stockton marks the beginning of a movement for the adoption by the nations in the future of some kind of international naval war code.

While the United States of America did not originate the movement aiming to free navigation upon many international navigable rivers, that is, rivers flowing through or between the territory of two or more nations through their entire navigable course, to the navigation of the vessels and boats of all the riparian nations, still the United States by their policy in insisting upon the freedom of navigation of the Mississippi as long as it flowed through or along the territory of two nations, and likewise in obtaining by treaty in exchange for freedom of naviga-

[28] Le Droit International Codifié, translated by Lardy, Paris, 1870.

tion of the Yukon, the Stikine and the Porcupine rivers by British vessels, the freedom of navigation of the St. Lawrence for American vessels, the United States have helped the general movement on the part of the family of nations to recognize, that the vessels of the upper riparian nations of international rivers and streams, shall not be cut off from access to the sea by the riparian nations lower down or controlling the entrance to the sea.

In working out the extent of the territorial sea, the United States of America also have done their share. In contradistinction with the vast, and often empty, claims of various sea powers to dominion over the sea that were put forward in the middle ages, in the beginning of the seventeenth century the idea was advanced—an idea which doubtless originated, as a Scottish publicist, T. W. Fulton, has suggested, in the fertile brain of Grotius and which another almost equally celebrated Dutch publicist, Bynkershoek, made known to all Europe in the next century—that along the sea shore where land and sea meet, the power of the sovereign of the land over the adjoining sea, extended as far as a cannon shot could be fired from the land out over the sea. The idea of what was the equivalent in measured distance of a cannon shot varied in different times and places, until Thomas Jefferson, as American Secretary of State, stated in 1793 both to M. Genêt, the envoy of France, and Mr. Hammond, the envoy of Great Britain, that the American Government would consider it, for the purposes of regulating its neutrality during the war then in progress between some of the powers of Europe, to be the equivalent of three geographical miles. That three-mile limit was adopted as the extent of the territorial sea in the treaty of 1818 concluded by America and Great Britain, and it has subsequently been adopted by most, though not by all, of the members of the family of nations.

In the expansion of another field of the Law of Nations, to wit, the development of the judicial machinery for substituting, whenever it is possible, judicial settlement for war in deciding the differences between nations, the United States have played a leading rôle; indeed it may be said that they have been the leader.

As the European nations began to emerge out of the gradually breaking up and disappearing feudal system, various plans for substituting in some way international justice for international war in deciding the disputes between nations, began to be made. Thus Henri Quatre and the Duc de Sully, Émeric Crucé, William Penn, the Abbé Castel de Saint Pierre, and Emmanuel Kant, among others, advanced various schemes to do away, more or less, with war. With some slight exceptions, however, it was not until after the conclusion of the treaty of 1783 that any continuous movement to avoid war by some means or other of judicial settlement began to be put in practice. In the Anglo-American treaty of November, 1794, known as Jay's Treaty, provision was made to refer three then existing subjects of disagreement between the contracting powers to mixed commissions for final decision and settlement.

Article five of Jay's Treaty provided for deciding what river was meant by the "name of the river Saint Croix" in the treaty of peace of 1783 between America and Britain; article six arranged for the submission to arbitration of the claims of British subjects against American citizens which had arisen in the past owing to various causes; and article seven provided for the settlement of the claims of American merchants which had arisen against the British Government owing to the acts of British war vessels. Eventually in the course of ten years or so, all these questions were settled in the manner provided for in Jay's Treaty. Then in concluding the war of 1812, again America and England agreed by the Treaty of Ghent to submit various boundary difficulties to international joint commissions. And after that many times again until the advent of the Civil War, the United States Government led in having its difficulties with other governments submitted to some form of international arbitration.

Then as the Civil War was approaching its close, it was a member of the Philadelphia Bar, Thomas Balch, who proposed in November, 1864, to President Lincoln and again in a public letter printed in the New York *Tribune,* May 13th, 1865, that the then pending American reclamations against Great Britain

growing out of the Civil War, known under the generic name of the *Alabama* claims, should be referred to a regularly constituted International Judicial Tribunal for judgment. That proposal eventually ripened into the Geneva Tribunal of 1871-72, which settled the *Alabama* claims by a judicial decision.[29] And the Geneva Tribunal became the model upon which were constituted the Paris International Tribunal that sat in 1893 upon the Bering Sea fur seal fisheries case, the international court which sat in judgment in the Venezuela boundary case, and also profoundly influenced the work of both the First and the Second Hague Peace Conferences in providing for a more easy and flexible way of constituting international courts appointed *ad hoc.*

As a great deal of confusion has arisen since the meeting of the Second Hague Peace Conference in 1907 over the real meaning of the words *arbitration* and *arbitrator* as terms of the Law of Nations, it may not be amiss to define the judicial meaning of the words, and differentiate them from the words *mediation* and *mediator,* with which today, owing to poor scholarship, the former two are often confounded. Without referring to the older dictionaries of Philipp and Johnson in England, and the edition of 1694 of the dictionary issued by the French Academy, it may be worth while to quote from one or two editions of the dictionaries of Webster and Worcester.

Noah Webster, in his *Dictionary* published at New Haven in 1806, gives these definitions: "Arbitrate, v. to hear and judge as an arbitrator." "Arbitration, n. reference of a controversy to persons chosen by the parties, a hearing before arbitrators." "Arbitrator, n. a person chosen by a party to decide a controversy, one who has the sovereign right to judge and control." Webster in his day and since has been recognized among scholars for having had a great knowledge of the meaning of words. And in the above quotations, from the first edition of his celebrated dictionary, he distinctly maintains that *to arbitrate* is to

[29] Concerning the Alabama Claims, see Frank Warren Hackett: Reminiscences of the Geneva Tribunal of Arbitration, 1872, New York and Boston, 1911.

judge, and that an *arbitrator* is one who possesses the "sovereign right to judge." Webster does not anywhere in the above citations even remotely suggest that arbitration means conciliation or mediation. In the revised and much enlarged edition of Webster's work, published at Springfield in 1908, it is distinctly affirmed again that to *arbitrate* means: "1. To decide; to determine. 2. To act as arbitrator or judge." Further in the edition of 1908 mediate and cognate words are defined as follows: "*Mediate,* a. 1. Being between the two extremes; middle; interposed; intervening; intermediate." "*Mediate,* v. i. 1. To be in the middle, or between two; to intervene. 2. To interpose between parties, as the equal friend of each, especially for the purpose of effecting a reconciliation or agreement, as, to mediate between nations." "*Mediator,* n. One who mediates; especially, one who interposes between parties at variance for the purpose of reconciling them; hence, an intercessor."

Joseph E. Worcester, who also is held in high esteem in the world of scholars for his sound and extensive knowledge of the meaning of English words, likewise maintains, in his dictionary published at Boston in 1846, that an *arbitrator* is a judge, not a reconcilor. He says: "Arbiter, n. (L) One appointed to decide a point in dispute, an arbitrator, a judge." "Arbiter, v. a. To judge." Arbitrate, v. a. To decide; to judge of." "Arbitrate, v. n. To give judgment. South." "Arbitration, n. Act of arbitrating (Law), the investigation and determination of a cause by an unofficial person, or by persons mutually chosen by the contending parties; arbitrament." "Arbitration, Bond, n. (Law) A solemn obligation to submit to an award. Blackstone." "Arbitrator, n. An umpire, a judge (Law). A person chosen by parties at variance to determine a matter in dispute." Thus after distinctly stating in the above quotations that an arbitrator is a judge, Worcester goes on to define *mediation* as "the act of mediating; interposition, intervention, agency interposed; intercession," and a mediator as, "One who mediates; an intercessor; one of the characters of our Blessed Savior." According to Worcester, therefore, there is nothing in common between arbitration and mediation. On the contrary

according to him they are words having different and distinct meanings, the former referring to a judicial function, the latter to a diplomatic one.

So likewise, by turning to the masters of the science of the Law of Nations, it becomes evident that by arbitration they mean a judicial process, while by mediation they denote a diplomatic mode of settling questions of dispute that arise between nations.

Vattel says: [30]

"The mediator ought to observe an exact impartiality; he should soften reproaches, calm resentment, and draw minds toward each other. His duty is to favor what is right, and to cause to be restored what belongs to each; but he ought not scrupulously to insist on rigorous justice. He is a moderator, and not a judge; his business is to procure peace; and to bring him who has right on his side, if it be necessary, to relax something with a view to so great a blessing. . . . When sovereigns cannot agree about their pretensions, and yet desire to maintain, or to restore peace, they sometimes trust the decision of their disputes to arbitrators chosen by common agreement. As soon as the compromise (agreement) is concluded, the parties ought to submit to the sentence of the arbitrators; they have engaged to do this, and the faith of treaties should be regarded."

Gustave Rolin-Jaequemyns says: [31]

"There is an international law. This law grows either from conventions, or from general principles accepted by civilized nations. . . . The states which accept arbitration recognize by that very thing (and it is that which gives to that procedure so great a value) that their difference is susceptible of being settled by the rules of international law, either general or conventional. It is to falsify that idea and to compromise its application, to admit beforehand in the agreement *(compromis)* itself, the eventuality of a solution dictated, not by the law, but by an arbitrary appreciation of the convenience of each party."

Westlake in contrasting arbitration with mediation, says: [32]

"The essential point is that the arbitrators are required to decide the difference—that is, to pronounce sentence on the question of

[30] Emer de Vattel: The Law of Nations, or Principles of the Law of Nature, Dublin, 1787, pp. 415-416.

[31] Revue de Droit International et de Législation Comparée, Brussels, 1891, pp. 84-85.

[32] John Westlake: International Law, 2nd ed., part 1, p. 354.

right. To propose a compromise, or to recommend what they think best to be done, in the sense in which best is distinguished from most just, is not within their province, but is the province of a mediator."

It has been said by Mr. John Bassett Moore *à propos* of mediation: [33]

"It is important from the practical as well as from the theoretical side of the matter, to keep in view the distinction between arbitration and mediation—a distinction either not understood or else lost sight of by many of those who have undertaken to discuss the one subject or the other. Mediation is an advisory, arbitration a judicial function. Mediation recommends, arbitration decides. And while it doubtless may be true that nations have, for this reason, on various occasions accepted mediation when they were unwilling or reluctant to arbitrate, it is also true that they have settled by arbitration questions which mediation could not have adjusted. It is, for example, hardly conceivable that the question of the *Alabama* claims could have been settled by mediation. The same thing may be said of many boundary disputes. In numerous cases the efforts of mediators have been directed, and successfully directed, to bring about an arbitration as the only means of putting an end to the controversy."

He says *à propos* of arbitration: [34]

"Its object is to displace war between nations as a means of obtaining national redress, by the judgments of international judicial tribunals; just as private war between individuals, as a means of obtaining personal redress has, in consequence of the development of law and order in civilized states, been supplanted by the processes of municipal courts."

In this connection it must not be forgotten that the United States of America have materially aided the development of mediation as a mode of adjusting international disputes. Thus for example, the calling in by President Wilson of the A. B. C. Powers of South America for the Niagara Falls Mediation Conference in 1914, to mediate between the United States and the various factions of Mexico, as well as between those factions themselves, was a notable precedent for the use of mediation between nations. While it is true that the efforts of Ar-

[33] John Bassett Moore: History and Digest of the International Arbitrations to Which the United States Has Been a Party, Washington, 1898, Vol. V, p. 5042.

[34] *Ibid.*, Vol. VII, p. 25.

gentina, Brazil and Chili acting at that conference through their ambassadors accredited to Washington were only in part successful, nevertheless, they did succeed in avoiding war between the United States and Mexico. In addition, in acting on that occasion as *compositeurs amiables* between the two North American nations, the A. B. C. Powers, thanks to the initiative of President Wilson in calling on them for their good offices, helped on the evolution of the Monroe Doctrine into the Pan-American Doctrine.

If the United States of America have only aided, however, where other nations had previously led the way, in the use of mediation, a diplomatic function, as a means of avoiding war, the North American republic has distinctly taken the leadership so far among the nations of the world in developing the substitution of international justice for international war in settling the disputes arising between nations. The Great War now raging—the greatest war that has been waged since human history began, in which most of the powers of Europe are engaged busily in destroying millions of lives and countless amounts of wealth saved and accumulated by past generations through many centuries—shows conclusively that there are some disputes arising between nations which cannot be settled before an international tribunal.[35] For if the contestants had really desired to avoid war in the present instance by an appeal to judicial means, it was not difficult for them to have called into being one of The Hague International Courts created *ad hoc* for which provision was made at the First Hague Peace Conference of 1899.

Serbia signified her willingness to appear with Austria-Hungary before such a court,[36] but the fact that such a tribunal was not called into being to pass judgment upon the original difficulty between Serbia and Austria-Hungary, thereby embroil-

[35] Thomas Balch: International Courts of Arbitration, 1874, 6th ed., Philadelphia, 1915, *passim.*

[36] Sá Vianna: Qui a Provoqué la Conflagration Européenne? Rio de Janeiro, 1915, p. 16. Ellery C. Stowell: The Diplomacy of the War of 1914, The Beginnings of the War: Boston, 1915, p. 64.

ing almost all Europe in war, shows that the cause of dispute in this case was of a very different character from the cause of difference in the *Alabama* claims and Bering Sea fur seal cases.[37] In the latter two cases which were both submitted and argued at the bar of and decided, according to the Law of Nations and the evidence submitted, by international tribunals appointed *ad hoc,* the political prestige and development of the litigant nations were not at stake. For, in favor of whichever nation, in those two cases, the court might decide, the judgment would not hamper nor menace the future political power of the loser. As a matter of fact the United States of America won the first case; Great Britain the second. And neither power for a day interrupted, because of either of those decisions, the even tenor of their political development.

But in the intermixed rivalry of the various powers of Europe, which finally broke out into war last year between Austria-Hungary and Serbia in the first instance, the political force and future development of the great powers were so interwoven that it was useless to hope that such a contest could be permanently settled by an international tribunal, whether such a court were constituted *ad hoc* according to the provision made by the First and Second Hague Peace Conferences, or whether there had existed a Supreme Court of the Nations always in being and composed of a small number of judges appointed for life, a dozen or fifteen in number. For no judicial tribunal could have decided which group of powers in Europe was the stronger and entitled to the hegemony in the affairs of Europe and the old world generally, which meant the power to control a large part of the commerce of the world to its own advantage. The same thing was true in 1870-71 on a smaller scale in the contest between France and Germany, for the Franco-Prussian war likewise was a contest to determine which was the stronger, in shaping the policies of the European powers, France or Germany. In both the *Alabama* claims and the Bering Sea fur

[37] Thomas Willing Balch: Différends Juridiques et Politiques dans les Rapports des Nations, Revue Générale de Droit International Public, Paris, 1914, pp. 137-182.

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seal cases, however, it was not a question of which was the stronger, the American Republic or the British Empire, but which was right according to the Law of Nations in its contention over a question in dispute which did not affect the vital political development of either nation in the future.

The classes of differences arising between nations which seem to be susceptible of a judicial solution have been termed by the French publicists *cas juridiques,* while those that do not seem to fall within the pale of international judicial procedure they have called *cas politiques.* The notable British publicists, Westlake and Oppenheim, have designated these two types of cases respectively, *legal* and *political* cases. Of late it has been the fashion among pacifists to call these two classes into which international cases seem naturally to divide, justiciable and non-justiciable cases. Certainly the term non-justiciable, which is a negative expression, is inferior to the term political, which is a positive expression, to designate the cases that apparently are not susceptible of being settled by reference to an international tribunal.

The past development and actual use of resorting to international justice to settle many difficulties that have threatened the amicable relations and peace of nations, prove beyond the shadow of a doubt that recourse by nations to international tribunals such as the courts that sat at Geneva on the *Alabama* claims and at Paris on the Bering Sea fur seal fisheries cases, has been a most precious mode of avoiding war. But in view of the Franco-Prussian war of 1870-71, the South African war of 1899-1902, the Russo-Japanese war of 1903-1905, and the Great War now raging, it is evident that in the present social and political development of the world, it is absurd to think that all causes of rivalry developing between nations can finally be decided by a reference to an international court instead of by war. And it will be a long time, if ever, before war is eliminated from human affairs.

Nevertheless, the United States of America may justly glory in the part they have taken in developing the recourse among nations of referring their differences often to interna-

tional judicial tribunals, and in the great suffering and loss that has thereby on several occasions been spared to humanity.

From this hasty look at the part this country has taken in shaping the Law between Nations, it becomes clear that the United States of America have played a notable rôle. Through their foreign policy from President Washington and Secretary Jefferson to President Wilson and Secretary Lansing, and by the writings of the American international publicists—Noah Webster, Peter Stephen Du Ponceau, James Kent, Henry Wheaton, Francis Lieber, William Beach Lawrence, Richard Henry Dana, Jr., Theodore Dwight Woolsey, Thomas Balch, Francis Wharton, Freeman Snow, to mention only some—they have done much to orientate the Law between Nations to the advantage of humanity and the advancement of the civilization of the world.

Thomas Willing Balch.

Philadelphia.

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